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ALEXANDER L. STEVAS,
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No. 82-459

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WALTER PARCINSKI,

Petitioner,

v.

THE OUTLET COMPANY
AND
THE EDWARD MALLEY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

This case involves three questions about the Age Discrimination in Employment Act (the "ADEA"), which have either been fully answered by this Court or are not applicable.

The questions presented are:

I. Have the criteria on the burden of proof, the allocation of such burden and the order of presentation of proof under the ADEA been established by this Court, and were they correctly applied by the Second Circuit, thereby not warranting further consideration?

II. Was there any issue before the Second Circuit regarding the proof required in a *prima facie* case under the ADEA when it was reviewing denial of motion for judgment n.o.v., and if not, does the decision of the Second Circuit conflict with *Aikens v. United States Postal Service*?

III. Was the Second Circuit in conflict with other federal courts of appeal in holding that in a record utterly devoid of any proof of discriminatory motivation or pretext there is no conflict in the evidence sufficient to create a question of fact for submission to the jury?

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The opinion of the United States Court of Appeals for the Second Circuit, reported at 673 F.2d 34, is reprinted in the Appendix to the Petition as Appendix A. The judgment of the United States District Court for the District of Connecticut, entered following the jury

verdict, is unreported, and is reprinted as Appendix B to the Petition. The order of the District Court denying Respondents' Motion for Judgment N.O.V. is unreported, and is reprinted as Appendix C to the Petition.

COUNTERSTATEMENT OF THE CASE

The facts of this case, although fully and accurately stated in the Second Circuit's decision (Appendix A to Petition), require certain amplification because Petitioner's Brief presents such a distorted interpretation of the evidence and the record.

The Petitioner in his Brief presents a one-sided statement and interpretation of the evidence, omitting the central facts upon which the Court of Appeals based its decision. Without attempting to catalog each of the instances in which such treatment has produced a picture that is out of focus, we respectfully direct this Court's attention to the more salient portions of the evidence, and then to Petitioner's misstatements.[1]

The Edward Malley Company ("Malley"), a Connecticut corporation with a principal asset consisting of a department store in downtown New Haven, Connecticut, had operated in New Haven for approximately 125 years (R. 3), but had fallen on hard times. As of March 31, 1977, about three months before the acquisition, it showed a loss of $4,277 on gross sales of $12,670,755 (T. 336) and was in debt more than $3,120,000. (T. 342) The Outlet Company ("Outlet") had heard through the marketplace, a common source of information, that Malley was having financial difficulties ". . . and might

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[1] In absence of direct evidence of intentional discrimination or pretext, there was no issue at trial which warranted jury determination.

well be on the market and available for purchase." (T. 413) Outlet was interested because it afforded its Department Store Division ". . . a well-known branch under a very excellent retailing name in the Connecticut marketplace." (T. 413)

Outlet, which was following a plan of acquisition or expansion because it wanted to grow, thought that in the acquisition of Malley it could continue the path of growth. (T. 335) Outlet proposed to acquire the stock of Malley for $100 and assume all of Malley's outstanding liabilities. (T. 414) By basically agreeing to pay all of Malley's debts, Outlet made the acquisition. (T. 342) Additionally, Outlet injected $600,000 into Malley after the acquisition. (T. 343) Even with this infusion of cash, Malley still continued to lose money after the acquisition. (T. 343)

At the time of the acquisition, Outlet operated seven stores within its Department Store Dvision, all as branch stores. (T. 235, 412) Mr. Levon F. Charlson, former president of Outlet Department Stores, described how the stores were operated:

> They were operated from a central merchandising base in the Providence store and the other stores were operated as branch operations in that they did not maintain their own buying or merchandising staffs, they're operated in a typical fashion of a branch operation which is understood in the retail business.

(T. 412)

With respect to the acquisition, Mr. Charlson said that upon his learning that Malley's might be available for acquisition (T. 412), he made certain suggestions to Outlet's management about the acquisition. (T. 415) Specifically, he set forth the methods of operation that

would be utilized if Outlet acquired Malley including the elimination of Malley's merchandising staff. (T. 416) The merchandising staff would typically include divisional merchandise managers, buyers, and assistant buyers. (T. 416)

At the time Mr. Charlson made his suggestions neither he nor the rest of Outlet Department Store's management knew the ages of Malley's merchandising staff. (T. 416, 247-248) The plan, organization chart, and *pro forma* budget, with Malley's as a branch store of Outlet Department Stores, was prepared in May, 1977, before any knowledge of the names and ages of the merchandising staff to be eliminated were known. (T. 238, 239, 242) Accordingly, as a result of the acquisition, Outlet eliminated the existing Malley's merchandising staff of thirty employees which included Petitioner.

Outlet could only consummate the acquisition if it turned Malley's into a branch operation and performed the buying function at its central location in Providence. (T. 417) Thus, the decision to eliminate the thirty positions was made by the management of Outlet Department Stores without any consideration given to the ages of the employees who filled the positions. Mr. Randall Dickerson, Vice President of Operations with Outlet Department Stores at the time of the acquisition, said that he did not learn of the ages until well after the method of acquisition had been approved by Outlet. (T. 252) Mr. Charlson was not provided any information about the ages. (T. 419) All of the Respondents' witnesses testified that the only manner in which the acquisition could be accomplished was to make Malley's into a branch store: Mr. Charlson (T. 415-417), Mr. Dickerson (T. 238, 265-266), Felix Oziemblewski (T. 339, 348).

Petitioner and one of his witnesses agreed. Petitioner testified that the reason for the elimination of his position was explained to him by Mr. Charlson. (T. 29, 55) He agreed that as a result of the acquisition ". . . the buying functions for Edward Malley were done away with by Outlet Company." (T. 55) Mr. Alfred Seigle, a former employee of Malley, who held the position of Malley's Merchandise Manager (T. 112), testified that he knew the Malley store was going to become a branch store. (T. 130) Mr. Seigle said that within his experience, a branch store was operated so that the buying function is done at the home office. (T. 130) Petitioner offered no evidence as to some other method by which Malley could have been acquired by Outlet, or that converting it into a branch store was not a reasonable business decision.

Having in mind the proper scope of this appeal and the significance of the evidence,[2] record references are critical. Petitioner has not shown the same circumspection and carefully omits all record references. Petitioner states that "[u]pon acquiring Malley, Outlet restructured certain jobs at the Malley Store with the goal of reducing employment costs". (Petitioner's Brief at 3) The uncontradicted evidence, as previously pointed out, however, is that the decision to eliminate Malley's buying staff was made as a method of acquisition and prior to any consideration of the buyers' ages. (T. 412, 415-416, 247-248, 238-239, 242)

Petitioner's statements of fact also show a careful editing of the testimony and use of the record out of

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[2] Simplistically, the issue on appeal is whether this Court will consider the Second Circuit's review of the record and its conclusion that it is "utterly devoid" of any proof of discriminatory motivation on the part of Respondents.

context.[3] For example, Petitioner states that Mr. Charlson, the then President of Outlet's Department Store division, when asked whether age had been a determining factor in his decision to eliminate the position of buyer responded "Not truly." Omitted was the next question on whether the ages were in any manner taken into consideration in eliminating those [buyer] positions and Mr. Charlson's testimony "Never." (T. 434)

Petitioner's presentation of facts in his Brief is also in conflict with his factual argument before the Second Circuit. He argues now that ". . . a Vice President of Outlet met with Alfred Seigle, the merchandise manager of Malley . . . to secure Seigle's assessment of the 'relative merits' of the Malley buyers". (Petitioner's Brief at 3) In the Reply Brief before the Court of Appeals, Petitioner admitted that in executing this work force reduction, The Outlet Company never conducted evaluation of employees (T. 287, 462).[4]

Petitioner also makes much of an alleged claim to a pension; "termination meant that he would not qualify for a pension despite 32 years' service." (Petitioner's Brief at 4) Petitioner had first engaged an attorney to handle his alleged claim for a pension on April 3, 1978, and thereafter had filed suit in the United States District Court for the District of Rhode Island on May 2, 1978. Although that case was dismissed for lack of subject matter jurisdiction, Petitioner's point about the pension

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[3] Petitioner's statement of the case lacks any references to the record.

[4] This is stated on page three of Petitioner's Reply Brief before the Second Circuit. The transcript references are to the cross examination of Randall Dickerson and Levon Charlson, Respondents' witnesses.

in his Brief is misleading and inappropriate. Attempting to connect Petitioner's termination with any attempt to defeat an alleged pension claim is inapposite to the position taken in the District Court.[5]

In summary, the Second Circuit's opinion demonstrates that it carefully reviewed all of the evidence before making its findings and reaching its conclusions. The Opinion demonstrates that there was ample basis for the Second Circuit's findings and conclusions.

REASONS FOR DENYING THE WRIT

The Second Circuit correctly decided the issues and its decision is not in conflict with any decisions of this Court, with *Aikens v. United States Postal Service* or with any other federal courts of appeal.

The Second Circuit, in reviewing the denial of Respondents' motion for judgment n.o.v., considered the record in this case in the light most favorable to Petitioner.[6] In arriving at its decision, the Court of

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[5] The issue of Petitioner's entitlement to a pension is still in litigation. His case against Respondents in the Superior Court for the City of New Haven, Connecticut, No. 170261, is pending. In fact, Petitioner proffered no evidence regarding the Malley pension plan other than his opinion that the pension was the factor that made a difference in his termination. (T. 84) The objective evidence, however, was that pensions were determined only by the Malley board of directors on a case-by-case basis, and were paid from profits. (T. 96, 97, 107)

[6] The application of the standard for review of a denial of judgment notwithstanding the verdict by the Second Circuit is not contested by Petitioner and is therefore not an issue before this Court. There is no dispute that the Second Circuit correctly exercised its appellate review function. *See Samuels v. Health and Hospitals Corp.*, 591 F.2d 195, 198 (2d Cir. 1979). *See also Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*).

Appeals concluded that Petitioner had failed to meet his ultimate burden of proof at trial to establish age discrimination. The Second Circuit applied the law previously established by this Court regarding the employee's burden of proof in an Age Discrimination in Employment Act ("ADEA") case. There is nothing in the Second Circuit decision to warrant consideration by this Court. The Court of Appeal's decision does not conflict with *Aikens v. United States Postal Service,* 642 F.2d 514 (D.C. Cir. 1980), *cert. granted,* 453 U.S. 902 (1981) (No. 81-1044), after remand, 665 F.2d 1057 (D.C. Cir. 1981), *cert. granted,* ___ U.S. ___ (1982) (No. 81-1044), since there was no issue before the Second Circuit regarding whether Petitioner met his burden of proof in his *prima facie* case. That is the issue on review in *Aikens.* Further, the Second Circuit's decision is not in conflict with any decisions of other federal courts of appeal. The Second Circuit, as well as all other federal courts of appeal, have followed the decisions articulated by this Court. This appeal does not raise any novel questions regarding age discrimination that are of public concern or of such importance to justify review by this Court.

It is apparent from the Court of Appeal's opinion and presentation of the evidence that it carefully reviewed and evaluated the evidence presented in the District Court in concluding that ". . . the record herein is utterly devoid of any proof of discriminatory motivation on the part of (Respondents) appellants." *Parcinski,* 673 F.2d at 39. Thus, for example, the Second Circuit, although finding that Respondents did not create ". . . jobs at lower salaries as department managers," "did not pursue options other than the mass firings of the Malley buyers, although these options were available," did not conduct "evaluations of employees," did not "compare absentee

rates or efficiency factors nor the comparative costs of Malley buyers against their [Outlet] owned," "did not follow a policy of attrition," "did not reduce salaries across the board," did not "change the relationship between salaries and bonuses," and did not "offer out placement facilities of any kind," *Parcinski,* 673 F.2d at 37, concluded that this evidence did not satisfy Petitioner's ultimate burden of proof. The Second Circuit found that although this evidence placed Respondents in a bad light with the jury, "it did not satisfy (Petitioner) plaintiff's burden of proof." *Parcinski,* 673 F.2d at 38.[7]

Lastly, in addition to the Second Circuit's conclusion that there was no direct evidence of discrimination, it also found that the evidence on the decision to eliminate Malley's buying staff was absence of age as a consideration and that Petitioner did not ". . . show any practices by [Respondents] defendants that could raise an inference of discriminatory animus." *Parcinski, supra,* at 38. The decision made by Outlet about not filling lower echelon, poorer paying jobs with Malley buyers because of potentially "serious morale problems" were "matters of concern for Outlet, not pretextual arguments." *Parcinski, supra* at 39.

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[7] The entire focus of Petitioner's case at trial to demonstrate pretext was his attempt to show the imprudence of the method of acquisition of The Outlet Company. Curiously, no evidence was presented by Petitioner as to some other method by which The Edward Malley Company could have been acquired other than converting it into a branch store. The Second Circuit in this regard held that the ADEA did not authorize the courts or juries to judge the wisdom of a corporation's business decision. *Kephart v. Institute of Gas Technology,* 630 F.2d 1217, 1223 (7th Cir. 1980); *Havelick v. Julius Wile Sons & Co.,* 445 F. Supp. 919, 926 (S.D. N.Y. 1978). Petitioner has continued to conceal his response to that legal proposition.

I.

THE CRITERIA ON THE BURDEN OF PROOF REQUIREMENTS, THE PROPER ALLOCATION OF BURDENS AND THE ORDER OF PRESENTATION OF PROOF UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, HAVE BEEN PREVIOUSLY ESTABLISHED BY A LINE OF DECISIONS OF THIS COURT, WERE CORRECTLY APPLIED BY THE SECOND CIRCUIT, AND NEED NOT BE REVIEWED.

Petitioner is incorrect in stating that the Second Circuit partially premised its decision on a finding that Petitioner did not satisfy the requirements for a *prima facie* case as defined by this Court. The Second Circuit made no such finding. Rather, the Second Circuit looked to all of the evidence as a whole and found that Petitioner had not satisfied his burden of proof as previously described and articulated by this Court. All of the evidence pointed one way and was not susceptible of any reasonable inference sustaining Petitioner's position. Thus, there is no question before this Court as to what burdens are placed on Petitioner and Respondents in a cause of action brought under the ADEA.

This Court has thoroughly considered the issues regarding the allocation of burdens and the order of proof in the context of discrimination cases brought under Title VII of the Civil Rights Act of 1964. Those burdens were well-described by this Court when the principles were established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The principles established in *McDonnell Douglas* have been elaborated upon in subsequent decisions by this Court. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1979);

Furnco Construction Co. v. Waters, 438 U.S. 567 (1978). That law has consistently applied these principles to age discrimination cases by virtually all of the courts of appeals, including the Second Circuit.[8] Moreover, in *Lorillard v. Pons*, 343 U.S. 575 (1978), the Court noted that "the [substantive] prohibitions of the ADEA were derived in *haec verba* from Title VII." *Lorillard* at 584. The guidelines have been so clearly laid down by this Court that there is no need for this Court to reiterate them in any case, much less intervene in this case. The conscientious efforts of the Second Circuit applying the burden of proof requirements as established by this Court further justify the lack of need for review here.

In short, the Court of Appeals held that Petitioner did not satisfy his burden of proof under *Burdine*. Respondents were not required to prove that there was a justifiable cause for the employee's discharge, *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914 (2d Cir. 1981), but Petitioner had the burden of proving that age was a "causative or determinative factor, one that made a difference in deciding whether the plaintiff should be employed." *Geller v. Markham*, 635 F.2d 1027, 1035 (2d Cir. 1980). In attempting to foist a new rule and limitation upon all federal courts of appeal, Petitioner

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[8] *See Smith v. Farah Manufacturing Co., Inc.*, 650 F.2d 64, 67 (5th Cir. 1981); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 411 (9th Cir. 1981); *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 919-920 (2d Cir. 1981); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1222 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); *Smithers v. Bailar*, 629 F.2d 892, 894 (3d Cir. 1980); *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980); *Loeb v. Textron*, 600 F.2d 1003, 1010 (1st Cir. 1979); *Schwager v. Sun Oil Co.*, 591 F.2d 58, 60 (10th Cir. 1979); *Hughes v. Black Hills Power & Light Co.*, 585 F.2d 918, 919 (8th Cir. 1978); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 311-312 (6th Cir. 1975).

disparages this law in suggesting that its mandates are insufficient in guiding a court of appeals in reviewing the evidence in an ADEA case. Of course, it is not a question of "guiding" a court of appeals. Such a court in review of a district court record has substantial latitude in arriving at its findings and conclusions.[9]

Thus, we must take issue with Petitioner's approach to the problem. Petitioner attempts to fragment the evidence in an effort to say that the Second Circuit addressed the issue of the *prima facie* case. The evidence cannot be fragmented because the Second Circuit's decision does not address Petitioner's *prima facie* case. The Second Circuit must, and in fact did, look to all of the evidence because the issue before it was the District Court's denial of Respondents' motion for judgment n.o.v. Petitioner seeks to persuade this Court to substitute its judgment for the Second Circuit. The Second Circuit carefully reviewed all aspects of the

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[9] We are not confronted with the issue of the obligation of a court of appeals to accept a district court's finding of fact unless clearly erroneous, or with distinctions between questions of fact and questions of law. In those instances in Title VII case, *see Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982). Petitioner makes a subsidiary argument that the Second Circuit's decision conflicts with the principles announced by this Court in *Pullman-Standard v. Swint*, U.S., 101 S. Ct. 1781 (1982). This is not the case. *Pullman-Standard* concerned whether a court of appeals was bound by the "clearly erroneous" role of Fed. R. Civ. P. 52(a) in reviewing a District Court's findings of fact in a non-jury Title VII case. The Second Circuit, in stark contrast, was not addressing any finding of fact. Rather, it was asked to review all of the evidence as to its sufficiency for warranting jury determination. While *Pullman-Standard* questioned the court of appeals' review of the trial judge's finding of fact in a Title VII case, the Second Circuit addressed whether this particular ADEA case should have been submitted to the jury.

evidence. Its decision reflects this careful consideration. The evidence and its application of the law amply supports it.

II.

THERE WAS NO ISSUE BEFORE THE SECOND CIRCUIT REGARDING WHAT IS NECESSARY TO PROVE A *PRIMA FACIE* CASE OF AGE DISCRIMINATION WHEN IT WAS REVIEWING THE DENIAL OF A MOTION FOR JUDGMENT N.O.V.; THEREFORE, THE DECISION DOES NOT CONFLICT WITH *AIKENS v. UNITED STATES POSTAL SERVICE.*

In what can only be considered a half-hearted effort, Petitioner attempts to characterize ". . . the first issue decided by the Court below" (Brief at 11), as the same with which the Court already has before it in *United States Postal Service v. Aikens,* No. 81-1044.[10] Petitioner's point creates a straw man. The Second Circuit never suggested anything with regard to Petitioner's *prima facie* case, which was the only focus of the District of Columbia Circuit Court of Appeals and this Court's attention in *Aikens.*[11] The fallacy of Petitioner's position is that there is no conflict between the fundamental principles applied by the Second Circuit and the stated reason for granting certiorari in *Aikens.*

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[10] Certiorari was granted in *Aikens* on March 22, 1982. The decision on review is *Aikens v. United States Postal Service,* 665 F.2d 1097 (D.C. Cir. 1981).

[11] The broad issue in *Aikens* is whether the four prerequisites of a *prima facie* case of discrimination have been tightened in light of *Texas Dept. of Community Affairs v. Burdine.* At the very least, the original petition for writ of certiorari was granted ". . . for further consideration in light of *Texas Department of Community Affairs v. Burdine* . . .," 453 U.S. 902.

In the original D.C. Circuit Court of Appeals divided decision,[12] *Aikens v. United States Postal Service, et al.*, 642 F.2d 514 (D.C. Cir. 1980), the sole issue for review on appeal was the correctness of the district court's grant of summary judgment for the Postal Service based on Aikens' failure to make out a *prima facie* case of racial discrimination under Title VII. The court of appeals reversed, holding that under *McDonnell Douglas Corp.*, a Title VII plaintiff need now show, as part of a *prima facie* case of promotion discrimination, that he was as qualified or more qualified than the person actually selected for promotion. The Court of Appeals remanded the case. Thereafter, the Postal Service filed a petition for a writ of certiorari, which was granted. This Court vacated the judgment and remanded to the court of appeals for reconsideration in light of *Texas Department of Community Affairs v. Burdine*.[13]

On remand, the court of appeals reaffirmed its previous holding that the district court had erred in requiring Aidens to show that his qualifications were equal to or better than those of the individuals actually selected for promotion. The court of appeals said that this Court had never held that establishment of a *prima facie* case must include proof that the plaintiff was "as qualified or more qualified" than the persons hired or promoted. Such a

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[12] The decision of the Second Circuit was unanimous.

[13] The Postal Service's petition had argued that in the *promotion context*, the court of appeals holding had not taken into account that oftentimes many applicants may be minimally qualified for a single vacancy, making any presumptions of minimum qualification illogical. The case before the Second Circuit was not a failure to promote case.

requirement was held not to be applicable to a *prima facie* case, 665 F.2d at 1059.[14]

In essence, the court of appeals in *Aikens* reaffirmed its earlier holding that an individual complaining of promotional discrimination in violation of Title VII can establish a *prima facie* case merely by showing the four stages of *McDonnell Douglas* without proving he was as qualified as the person promoted. That holding, viewed under *Burdine* in the promotional context, is the controlling issue before this Court on certiorari. The *Aikens* issue involves only whether a Title VII plaintiff, in order to establish a *prima facie* case of promotional discrimination, must show that he was qualified for the sought-after position or, as the district court held, that he was as qualified as or more qualified than the person selected by the employer.

We respectfully suggest that the *Aikens* issue and the context in which it arose was not before the Second Circuit and is not an issue in this case. Here, the sole issue is whether a jury question was created by Petitioner in the absence of any evidence of intentional discrimination or pretext. The Second Circuit's decision, unlike the *Aikens* case, does not address whether Petitioner made out a *prima facie* case. In fact, the Second Circuit analysis assumes a *prima facie* case.[15] The Second Circuit was reviewing the evidence on a ruling denying motion for judgment n.o.v. In reviewing the record, the Second

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[14] The Postal Service argues in its Brief that in light of *Texas Department of Community Affairs v. Burdine*, the elements identified by the court of appeals are insufficient *in the context* to show that plaintiff was rejected under circumstances which give rise to an inference of unlawful discrimination.

[15] The Second Circuit makes no mention of the term "*prima facie*" in its Opinion.

Circuit was only concerned with the application of the principles enumerated in *Burdine* beyond the *prima facie* case as they applied to Petitioner's burden of persuading the trier of fact that age was a determining factor in his discharge. *Burdine* at 253.

Putting aside Petitioner's descriptive epithet (the Second Circuit decision is in "direct conflict" with *Aikens*), there is virtually no attempt to compare the Second Circuit's decision to that on appeal in *Aikens*. We respectfully submit that there is no comparison which can be made between the two cases.

III.

THE SECOND CIRCUIT'S HOLDING THAT IN A RECORD UTTERLY DEVOID OF ANY PROOF OF DISCRIMINATORY MOTIVATION OR PRETEXT THERE IS NO CONFLICT OF EVIDENCE SUFFICIENT TO CREATE A QUESTION OF FACT FOR SUBMISSION TO THE JURY IS NOT IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEAL.

Petitioner claims that the Second Circuit's opinion is in conflict with decisions from other circuits. An analysis of these cases supports a contrary conclusion.

Petitioner erroneously implies that the Second Circuit ruled as a matter of law that a plaintiff, even if he has introduced evidence sufficient to establish a *prima facie* case, cannot prevail unless he produces evidence specifically refuting the employer's explanation for the termination. Petitioner states that the Fifth Circuit has adopted a "similar" rule in *Reeves v. General Foods Corp.*, 662 F.2d 515 (1982), and argues that the Second and Fifth Circuits are in direct conflict with decisions of the Fourth and Eighth Circuits in *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir. 1981), and

Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193 (8th Cir. 1982), *petition for cert. pending*, No. 81-2202. Once again, what Petitioner leaves unsaid about these four decisions is most significant.

Petitioner's Brief does not address the following legal propositions asserted in each of the decisions which are left intact:[16] first, that in the absence of direct evidence of intentional discrimination or any evidence of pretext, when the employer articulates his legitimate business reason, there is no conflict of evidence sufficient to create a question of fact for the jury. Second, this is a correct application of the law under *Burdine*. Third, that this application is consistent with the law as applied by all courts of appeal. Also significant is the fact that while Petitioner devotes much space to demonstrating the "flaw" in the Second Circuit's rule, he nowhere specifically compares the holdings in the four cited decisions as demonstrating the conflict. (See Brief at 14 and 15.) We respectfully invite the Court's attention to a proper analysis of these four cases, beginning with what the Second Circuit actually held.

The Second Circuit did not state the rule as articulated by Petitioner. The Second Circuit found that Petitioner did not meet his burden of proof in the case. In so

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[16] The brief in opposition to the petition for certiorari in *Tribble* further points to the Fifth, Seventh, and Sixth Circuits as being in agreement on the law, but differing on a case-to-case basis on the question of quantitative evidence. *See Simmons v. McGuffy Nursing Homes, Inc.*, 619 F.2d 369 (5th Cir. 1980), *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980), and *Ackerman v. Diamond Shammock Corp.*, 670 F.2d 66 (6th Cir. 1982). In these three decisions, the Court found insufficient evidence to warrant submission of a genuine issue of material fact to the trier of fact.

holding, the Second Circuit ruled that Petitioner had failed to introduce either direct evidence of discrimination or any evidence of pretext. Citing *Burdine*, the Second Circuit correctly stated the rule that ". . . the employee has the burden of proving that the discharge resulted, in part at least, from intentional discrimination . . . that burden has not been met in this case." *Parcinski*, 673 F.2d at 37. In essence, there was no direct evidence of discrimination. As to evidence of pretext, the Court of Appeals after viewing the evidence in a light most favorable to Petitioner,[17] found that it did not constitute evidence of pretext. The Second Circuit concluded in this regard that although such evidence "obviously placed Outlet in a bad light with the jury", it did not satisfy plaintiff's burden of proof. All the Second Circuit did was apply the *Burdine* principles in concluding that after the employer articulates the legitimate nondiscriminatory reason for the discharge, the inference of discrimination which has been created by employee's *prima facie* case is destroyed. Employee then has the ultimate burden of proof to provide either evidence of pretext or evidence of direct discrimination (which might have been provided in the *prima facie* case as well). Another way to state the application of the *Burdine* rule is that by presenting evidence of direct discrimination or pretext, the employee has satisfied his burden of creating an issue of fact as to the employer's

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[17] The Second Circuit's review of the evidence gave more than a benefit of the doubt to Petitioner. The use of the summary of facts contained in plaintiff-appellee's brief was more than viewing the evidence favorably to the Petitioner. In fact, a good part of that evidence was never introduced but consisted merely of the content of questions posited by Petitioner's counsel to Respondents' witnesses.

legitimate nondiscriminatory business reason. Such an issue did not exist in the District Court, said the Second Circuit.

Reeves is consistent with the Second Circuit's application of the law, but again does not stand for the proposition as stated by Petitioner. The sole issue on appeal in *Reeves* was whether there was substantial evidence of intentional, age-based discrimination to support the jury's verdict. The Fifth Circuit, after discussing the standards of review for analyzing the sufficiency of the evidence,[18] concluded that there was substantial evidence of intent to discriminate on the part of General Foods, on which the jury's verdict could be sustained.

The agreement between the Second and Fifth Circuits is patent: if there is sufficient evidence of intentional discrimination or pretext, the discrimination case warrants submission to the jury for the determination of those factual issues. In *Reeves* there was sufficient evidence of intentional discrimination. In the Second Circuit decision, there was not sufficient evidence of either intentional discrimination or pretext to warrant submission of the case to the jury.

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[18] Petitioner does not contend that the Second Circuit abused its standard for review of a denial of the judgment n.o.v. Under that standard as uniformly applied, if the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting the motion is proper. On the other hand, if there is substantial evidence, that is, evidence of such quality of weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*); *Samuels v. Health & Hospitals Corp.*, 591 F.2d 195 (2d Cir. 1979).

Petitioner makes a one sentence stab at suggesting that the rule in the Fourth and Eighth Circuits is different than in the Second and Fifth Circuits: an ADEA case cannot be reversed on appeal even though plaintiff's evidence consists solely of that necessary to establish the *prima facie* case. (Petitioner's Brief at 15.) The asserted contradiction between the circuits further assumes that the employer called witnesses to testify that the decision was premised on legitimate considerations. (Petitioner's Brief at 18.) Petitioner not only misstates the holdings of the two cases from the Fourth and Eighth Circuits, but overstates the "rule" as well.

In *Spagnuolo*, the Fourth Circuit upheld the district court's findings that there was direct evidence of the purpose and conduct of Whirlpool in demonstrating discrimination against the employee, which the jury found persuasive. The reliance on direct evidence instead of inference obviated any need for an independent showing that Whirlpool's justifications were "pretextual." *See Loeb v. Textron, Inc.*, 600 F.2d 1003, 1017-18 (1st Cir. 1979). In so ruling, the Fourth Circuit was consistent with the Second and Fifth Circuits. As the Fourth Circuit stated, the plaintiff did not rely on statistical data or any other kind of inferential proof of discriminatory motive. Because of plaintiff's *direct evidence*, a question of fact was created as to Whirlpool's articulated legitimate business reason.

Tribble is presented as a case consistent with the "different" Fourth Circuit rule. Quite the contrary, *Tribble* is purposely consistent with the other three Circuits. The issue on appeal was Westinghouse's contention that the district court had erred when it failed to grant Westinghouse's motion for directed verdict because plaintiff had not come forward with any evidence that

the reasons given by Westinghouse were pretextual. The Eighth Circuit was satisfied that plaintiff's *prima facie* evidence contained sufficient evidence to establish the possible pretext of Westinghouse's offered evidence of a legitimate non-discriminatory reason for discharging plaintiff. No new or different rule of law was cited. All that happened was that the Eighth Circuit, in fulfilling its standard of review, found evidence of pretext. This created an issue of fact warranting the denial of directed verdict for Westinghouse.

These four cases do not represent a conflict among the federal courts of appeals; they represent differences in the quantity and quality of a plaintiff-employee's evidence in each particular case. What Petitioner seeks is a rule requiring the submission of an ADEA case to a jury regardless of how conspicuously silent evidence of discrimination or pretext may be. The point being urged is the application of a non-flexible rule. Such a rule would require every ADEA case to be submitted to a jury thereby negating any role a trial judge should play in considering whether the evidence warrants jury determination.[19]

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[19] For role of trial judge on motions for directed verdict, see 5A Moore's Federal Practice ¶ 50.02.

CONCLUSION[20]

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[20] Pursuant to Sup. Ct. R. 28.1, Respondent Outlet Company has no parent company and its only subsidiary not wholly owned is KOVR TV, Inc. The Edward Malley Company's parent is United Department Stores, Inc.